STATE OF MICHIGAN

COURT OF APPEALS

HICKS FAMILY LIMITED PARTNERSHIP, Plaintiff-Appellant,	UNPUBLISHED July 15, 2008
v	No. 276575 Livingston Circuit Court
1ST NATIONAL BANK OF HOWELL, Defendant-Appellee.	LC No. 04-021141-CE

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In this action to recover cleanup costs under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

The relevant background facts are set forth in this Court's prior opinion in *Hicks Family Ltd Partnership v 1st Nat'l Bank of Howell*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 2006 (Docket No. 268400), slip op at 1-2:

> This action arises from the environmental contamination of property located at 4030 Grand River in Howell, Michigan. Before 1983, the property was owned by G & G Paint Developers ("G & G"), subject to a mortgage held by defendant. In 1983, G & G defaulted on the mortgage and defendant foreclosed on the property. Defendant subsequently sold the property to J.D. Hicks and Daphne Hicks in March 1983. J.D. Hicks thereafter died, and Daphne Hicks conveyed her interest in the property to her revocable living trust, which subsequently conveyed the property to plaintiff on December 16, 1996. When defendant acquired the property, it was contaminated with buried drums of paint and paint thinners, presumably left by G & G. The purchase agreement between defendant and the Hickses included the following provision:
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> "Sellers agree to have all equipment inside and out, all stock, debris and residue removed from premises at time of closing, in compliance of E.P.A. Rules & Regulations."

> Defendant hired environmental consultants and performed environmental cleanup tasks between 1983 and 1997. In 1997, defendant unsuccessfully applied to the Department of Environmental Quality (DEQ) to have the property "delisted" from a state-maintained list of contaminated sites. Defendant did not resume cleanup efforts after the DEQ rejected its petition.
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> In 2004, plaintiff began to implement plans to develop the property. Plaintiff discovered that several drums containing hazardous substances were still buried on the property. Plaintiff also discovered that the groundwater and soil remained contaminated. In December 2004, plaintiff brought this action against defendant to recover the costs it incurred in decontaminating the property. Plaintiff asserted claims for recovery of response costs and contribution under Michigan's Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq.*, as well as common-law claims for public nuisance, private nuisance, negligent performance of a contract, breach of contract, trespass, and silent fraud.

This Court affirmed the dismissal of plaintiff's various common-law claims, but reversed the dismissal of the NREPA cost-recovery claim and remanded for further proceedings concerning whether defendant may be liable under MCL 324.20126(1)(b) or (d). *Id.* This Court also directed the trial court to permit plaintiff to file an amended complaint to clarify its NREPA claim, and to allow defendant to move for summary disposition based on the amended pleadings. *Id.*, slip op at 3-6.

On remand, plaintiff filed an amended complaint alleging defendant's liability as both an "operator" and an "arranger" under MCL 324.20126(1)(b) and (d). Defendant again moved for summary disposition under MCR 2.116(C)(8) and (10), and the trial court granted its motion. The court concluded that defendant was entitled to summary disposition because (1) plaintiff, as a potentially responsible party (PRP), was legally barred from maintaining a cost recovery claim, (2) even if plaintiff could properly bring an action, the evidence established that defendant was neither an "operator" nor an "arranger" under MCL 324.20126(1)(b) and (d), and (3) there was no causal nexus between defendant's alleged conduct and plaintiff's response costs.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). As explained in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998):

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. [Citations omitted.]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). We consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the

nonmoving party and determine whether the moving party was entitled to judgment as a matter of law. *MEEMIC v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000).

We agree that plaintiff's status as a PRP did not preclude it from bringing this action against defendant for recovery of response costs. Part 201 of the NREPA was enacted by 1994 PA 451 as part of a repeal and reenactment of the former Michigan Environmental Response Act (MERA), MCL 299.601 *et seq*. *Cairns v Lansing*, 275 Mich App 102, 108; 738 NW2d 246 (2007). Part 201 was modeled after the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *Genesco, Inc v Dep't of Environmental Quality*, 250 Mich App 45, 50; 645 NW2d 319 (2002). Both the federal and state statutes provide for identification of contaminated sites and prompt remediation, and create a private cause of action to establish liability for costs of investigation and remediation of contaminated sites. *Id*. Thus, federal authority concerning CERCLA is instructive in light of the similar purposes of the NREPA and the CERCLA. *Id*. at 53.

At the time the trial court decided defendant's motion, there was a split of authority in the federal circuits with respect to whether a plaintiff's status as a PRP precluded it from bringing a cost-recovery action. The majority view was that PRPs were precluded from bringing a cost-recovery action under the CERCLA. However, the United States Supreme Court subsequently resolved that issue in *United States v Atlantic Research Corp*, ___ US ___; 127 S Ct 2331; 168 L Ed 2d 28 (2007). After considering the language of the statute as a whole, the Supreme Court held that the plain language of 42 USC 9607(a) provides PRPs with a cost-recovery cause of action.

Because MCL 324.20126a is modeled after § 107(a) of the CERCLA, we conclude that a similar result is mandated under the NREPA. This conclusion is supported by *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 592; 593 NW2d 565 (1999), in which this Court rejected the argument that a PRP may only recover response costs from other PRPs in an action for contribution, and held that an action may also be brought under former § 12(2)(b) of the MERA, which is now codified as § 20126a(1)(b) of the NREPA.

Accordingly, the trial court erred by granting defendant's motion for summary disposition on the ground that plaintiff's status as a PRP precluded it from bringing its action.

However, we agree with the trial court that plaintiff failed to show that defendant was either an "operator" or an "arranger" under MCL 324.20126(1)(b) or (d). The NREPA establishes several categories of PRPs. At issue here are MCL 324.20126(1)(b) and (d), which provide:

> (1) Notwithstanding any other provision or rule of law and except as provided in subsections (2), (3), (4), and (5) and section 20128, the following persons are liable under this part:
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> * * *
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> (b) The owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release.

* * *

> (d) A person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, by any other person, at a facility owned or operated by another person and containing the hazardous substance. . . .

Even if the evidence of the 1984 barrel rupture was sufficient to show that defendant disposed of a hazardous substance and was responsible for an activity causing a release, in order for operator status to apply, a defendant (1) must have had authority to control the operations or decisions involving the disposal of the hazardous substance, or (2) must have assumed responsibility or control over the disposition of the hazardous substance. See *Farm Bureau Mut Ins Co of Michigan v Porter & Heckman, Inc*, 220 Mich App 627, 652; 560 NW2d 367 (1996). Here, defendant's only connection to the site was its remedial clean-up effort, which was insufficient to establish the requisite nexus required for liability as an operator. See *Stilloe v Almy Bros, Inc*, 782 F Supp 731 (ND NY, 1992), cited with approval in *Farm Bureau*, *supra*.[1] Further, defendant could not be held liable as an arranger as it did not intend the 1984 disposal. *Farm Bureau*, *supra* at 659-661.

The trial court did not err by granting defendant's motion for summary disposition on the ground that defendant was neither an operator nor an arranger under MCL 324.20126(1)(b) and (d). In light of our decision, it is unnecessary to consider the causation issue raised in this case.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[1] Plaintiff's reliance on defendant's 1978 mortgage with the prior owner to establish defendant's authority to control operations at the site is misplaced. That mortgage was foreclosed before the 1984 barrel rupture and, therefore, was no longer operative.